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No. 08-1167

In the Supreme Court of the United States

MULLICA WEST, LIMITED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
JEANNE E. DAVIDSON
BRIAN M. SIMKIN
SHALOM BRILLIANT
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioners' claims for breach of their contractual right to prepay their federal loans, which they had obtained under the Senior Citizens Housing Act of 1962, Pub. L. No. 87-723, § 4(b), 76 Stat. 671 (42 U.S.C. 1485), accrued when the United States declined to grant petitioners' requests to prepay and instead offered incentive loans in accordance with the Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, § 241, 101 Stat. 1886 (42 U.S.C. 1472).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 550 F.3d 1135. The opinions and orders of the Court of Federal Claims (Pet. App. 26a-34a, 35a-70a, 71a-100a) are reported at 81 Fed. Cl. 511, 80 Fed. Cl. 724, and 76 Fed. Cl. 512.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2008. The petition for a writ of certiorari was filed on March 16, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1962, Congress enacted the Senior Citizens Housing Act (SCHA), Pub. L. No. 87-723, § 4(b), 76 Stat. 671 (42 U.S.C. 1485(a)), which amended the Housing Act

of 1949 (Housing Act), ch. 338, 63 Stat. 413 (42 U.S.C. 1441 *et seq.*), to authorize the Farmers Home Administration (FmHA),[1] under Section 515 of the Housing Act, to make direct loans to private nonprofit corporations and consumer cooperatives "to provide rental housing and related facilities for elderly persons and elderly families of low or moderate income in rural areas." The loans were to be made for terms up to 50 years. SCHA § 4(b), 76 Stat. 671 (42 U.S.C. 1485(a)). Borrowers agreed to operate the properties financed with those loans for the occupancy of low or moderate income tenants until the loan balances were paid in full. Pet. App. 2a. The promissory notes associated with the loans allowed borrowers to prepay the loans at any time. *Id.* at 2a-3a.

In 1987, Congress enacted the Emergency Low Income Housing Preservation Act (ELIHPA), Pub. L. No. 100-242, § 241, 101 Stat. 1886 (42 U.S.C. 1472), which imposed restrictions upon prepayment of Section 515 loans. ELIHPA requires that, prior to accepting an offer to prepay a Section 515 loan entered into before December 21, 1979, the FmHA

> shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities involved for not less than the 20-year period beginning on the date on which the agreement is executed.

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[1] The Rural Housing Service is the successor agency to the Farmers Home Administration. For purposes of this brief, "FmHA" refers to the Farmers Home Administration or the Rural Housing Service, where appropriate.

42 U.S.C. 1472(c)(4)(A). The statute further authorizes the FmHA to include certain enumerated incentives in such an agreement, including an increase in the rate of return on investment, reduction of the interest rate on the loan, and an equity loan. 42 U.S.C. 1472(c)(4)(B). If the FmHA determines after a reasonable period that an agreement cannot be reached, then, subject to certain exceptions, it must "require the borrower * * * to offer to sell the assisted housing and related facilities involved to any qualified nonprofit organization or public agency at a fair market value." 42 U.S.C. 1472(c)(5)(A)(i). If no qualified purchaser offers to purchase the property within 180 days of the offer to sell, then prepayment may be accepted. 42 U.S.C. 1472(c)(5)(A)(ii).

2. In 1977, petitioner Mullica West, Limited (Mullica) entered into Section 515 loan agreements with the FmHA that were scheduled to mature in 2017 and that granted Mullica the right to prepay "at any time." Pet. App. 3a. On October 11, 1988, Mullica submitted to the FmHA a written request "to pay off the remaining mortgage balance" on its Section 515 loans. *Id.* at 5a. On March 30, 1989, the FmHA informed Mullica that it was "unable to accept [Mullica's] offer to prepay the loan * * * at this time." *Ibid.* On March 14, 1991, the FmHA offered Mullica an incentive loan package, which Mullica accepted on June 18, 1991. *Id.* at 6a. The new loan was scheduled to mature in 2036, and it included a 20-year restriction period during which Mullica was required to maintain the financed housing for low-to-moderate income renters. *Ibid.*

In 1978, petitioner Park Terrace Limited (Park Terrace) entered into similar loan agreements with the FmHA, which were scheduled to mature in 2028 and

allowed Park Terrace to prepay "at any time." Pet. App. 3a. On November 19, 1991, Park Terrace submitted to the FmHA a written request "to pay off the remaining mortgage balance" on its Section 515 loans. *Id.* at 6a. On June 23, 1992, the FmHA offered Park Terrace an incentive loan package, which Park Terrace accepted on July 16, 1993. *Id.* at 7a. The new loan was scheduled to mature in 2043, and it included a 20-year restriction period during which Park Terrace had to maintain the financed housing for low-to-moderate income renters. *Ibid.*

3. On June 22, 2005, petitioners brought suit in the Court of Federal Claims (CFC). Their complaint asserted, *inter alia*, breach of contract claims arising from the government's denial of their attempts to prepay their Section 515 loans. Pet. App. 8a. The government argued that the claims were barred by the Tucker Act's statute of limitations, which provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. 2501. The government contended that the six-year limitations period had begun to run when the FmHA denied petitioners' requests to prepay their loans in 1991 and 1992, respectively. Pet. App. 8a-9a.

The CFC granted summary judgment to the government. As relevant here, the court concluded that "Park Terrace's and Mullica's breach claims accrued at least by 1992 and 1991 when FmHA and [petitioners] entered into incentive-loan transactions." Pet. App. 59a-60a.

4. The court of appeals affirmed. Pet. App. 1a-25a. As relevant here, the court explained that "[t]he 1988 and 1991 letters sent by Mullica and Park Terrace to the government were clear, unconditional offers of prepay-

ment sufficient to trigger a duty by the government to accept the tender under the terms of the pre-1979 loans." *Id.* at 16a. The court also stated that "by offering incentive loans in response to [petitioners'] requests for prepayment, the government necessarily rejected the tender and breached its obligation to accept prepayment at any time." *Id.* at 17a. Accordingly, the court concluded that "the transactions underpinning [petitioners'] acceptance of incentive loans triggered breach of the original loan agreements and commencement of the six-year statute of limitations," which "expired in 1997 for Mullica and in 1998 for Park Terrace." *Id.* at 20a.

The court of appeals rejected petitioners' contention that further fact-finding was necessary. Petitioners had argued "that the Court of Federal Claims erred by refusing to consider evidence concerning the context of" petitioners' attempt to prepay. Pet. App. 18a. Petitioners had contended as well "that the requests for prepayment were 'pro forma' and were part of a 'charade' designed to secure incentives in lieu of insistence on prepayment." *Ibid.* The court of appeals concluded that petitioners' "assertions * * * [were] undermined by the allegations in their own Complaint," *id.* at 19a, which "suggest[ed] both that [petitioners] desired to prepay their FmHA loans and that their requests to do so were rejected by the government," *id.* at 20a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly held that petitioners' claims are time-barred. In *Franconia Associates* v. *United States*, 536 U.S. 129 (2002), this Court addressed

the question of when the statute of limitations begins to run on breach of contract claims such as those at issue in this case. The Court held that "[u]nless [Section 515 borrowers] treated ELIHPA as a present breach by filing suit prior to the date indicated for performance, breach would occur [and the statute of limitations would begin to run] when a borrower *attempted* to prepay, for only at that time would the Government's responsive performance become due." *Id.* at 143 (emphasis added); see *id.* at 133 ("breach would occur, and the six-year limitations period would commence to run, when a borrower tenders prepayment and the Government then dishonors its obligation to accept the tender").

Mullica and Park Terrace attempted to prepay their loans in 1988 and 1991, respectively, by submitting written requests to the FmHA. Pet. App. 5a, 6a. The government did not honor those requests but instead offered petitioners new incentive loans in 1991 and 1992, respectively. *Id.* at 6a-7a. Under *Franconia*, the government's failure to accept prepayment triggered the statute of limitations. Accordingly, as the court of appeals correctly held, "the six-year statute of limitations expired in 1997 for Mullica and in 1998 for Park Terrace." *Id.* at 20a. Because petitioners did not file this suit until 2005, their claims are time-barred.

2. Petitioners' various challenges to the court of appeals' decision lack merit.

a. Petitioners suggest (Pet. 10-11) that, under *Franconia*, a physical transmission of prepayment was necessary in order to trigger the six-year limitations period. This Court's decision in *Franconia* provides no support for that view. As the court of appeals explained, "the *Franconia* decision is not authority for 'tender' being satisfied only by the highly formalized and technical

process advanced by [petitioners]." Pet. App. 15a. To the contrary, the Court in *Franconia* explained that "'breach would occur when a borrower *attempt[s]* to prepay.'" *Ibid.* (quoting *Franconia*, 536 U.S. at 143) (emphasis added). This Court's decision therefore "does not suggest that a physical transfer of money must be attempted in order to constitute a tender of payment." *Ibid.* Because no other court of appeals has read *Franconia* in a contrary manner, this Court's intervention is unnecessary.[2]

b. Petitioners also contend (Pet. 12-14) that, even if they tendered prepayment, the government never expressly rejected their tender. This Court's decision in *Franconia*, however, does not require an express rejection by the government to trigger the limitations period. As the court of appeals correctly explained, that decision "requires no more formalism than the written request to prepay followed by non-acceptance of the request by the government to trigger the running [of] the statute of limitations." Pet. App. 17a. Although "[t]he government's responses to Mullica and Park Terrace did not explicitly state that the offers of prepayment were 'rejected,'" *id.* at 16a, "the government did not accept those offers," *id.* at 16a-17a, but instead "offered incentive loans," *id.* at 17a. Accordingly, "by offering incentive loans in response to [petitioners'] requests for prepayment, the government necessarily rejected the ten-

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[2] Petitioners contend (Pet. 11) that the court of appeals should have applied their narrow understanding of tender because it "establishes a 'bright line' test." That contention is unavailing, not only because it is unsupported by *Franconia* but also because it is superfluous. What *Franconia* requires to start the limitations clock—an "attempt" to prepay—is also a "bright line."

der and breached its obligation to accept prepayment at any time." *Ibid.*[3]

c. Petitioners also contend that their tender of prepayment and the government's rejection thereof did not start the limitations period because "both sides treated the 'prepayment' letters and their responses as part of an orchestrated effort to" agree to a new incentive loan. Pet. 22. Petitioners argue (Pet. 14-24) that the court of appeals should have allowed further fact-finding to determine whether petitioners actually intended to prepay. That contention lacks merit.

Under *Franconia*, the commencement of the limitations period does not depend on whether the plaintiff subjectively intended to prepay its Section 515 loan. Rather, the six-year period began to run when petitioners "attempted" to prepay and the government rejected those attempts. 536 U.S. at 143. In fact, the Court in *Franconia* acknowledged that the FmHA, in order to implement ELIHPA, had developed standard procedures to handle prepayment requests, which included offering incentive packages. See *id.* at 137. Although petitioners cite those procedures as evidence that their attempt to prepay was simply a "drill," Pet. 20, the government's failure to allow prepayment under those circumstances (*i.e.*, the government's implementation of ELIHPA) is *exactly* what the Court in *Franconia* found to trigger the statute of limitations. 536 U.S. at 143.

In any event, as the court of appeals correctly observed, petitioners' characterization of the prepayment process is "undermined by the allegations in [petitioners'] own Complaint," Pet. App. 19a, which "suggest[s]

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[3] That conclusion is reinforced in Mullica's case, because the government's offer of incentives was preceded by a letter in which the government expressly declined to accept prepayment. Pet. App. 16a n.14.

both that [petitioners] desired to prepay their FmHA loans and that their requests to do so were rejected by the government," *id.* at 20a. And while petitioners had a contractual entitlement to prepay their loans under the terms of their original agreements, both Mullica and Park Terrace ultimately accepted incentive loan packages from the FmHA. See *id.* at 6a, 7a. Petitioners alleged in their complaint that they had accepted the incentives "under duress," but that allegation logically depends on the premise that petitioners had sought to exercise their prepayment rights and the FmHA had refused to comply with its contractual obligations. See *id.* at 94a-95a. Thus, if the FmHA's refusals to accept petitioners' offers to prepay did *not* constitute breaches of the parties' contracts, it is unclear what subsequent breach petitioners could plausibly seek to establish.

3. Finally, further review is unwarranted because of the limited prospective importance of this case. Petitioners contend that the issues presented are important because "many other owners with projects governed by ELIHPA have rights which may turn on the decision in this case." Pet. 6. However, the only owners of projects governed by ELIHPA whose claims are likely to be controlled by the court of appeals' decision here are those who submitted prepayment requests that the government failed to grant, and who filed or may file suit more than six years thereafter. The government is aware of only one pending case, *Parkwood Assocs. Ltd. P'ship* v. *United States*, No. 07-742C (Fed. Cl. argued Mar. 17, 2009), that is likely to be controlled by the court of appeals' ruling.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
JEANNE E. DAVIDSON
BRIAN M. SIMKIN
SHALOM BRILLIANT
Attorneys

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